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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

No. 286.

TOM DON FRANANO,
Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING ON ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

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Comes now Petitioner herein and respectfully moves the Court to set aside its order denying a writ of certiorari herein, entered on October 10, 1960, and grant petitioner a rehearing on his petition for a writ of certiorari for the following reasons and substantial grounds which were available to petitioner although not previously presented.

I.

The Government's Use of Summary Charts at the Trial of This Matter, Going to All Counts of the Indictment, Reflecting Information and Data Not in Evidence at the Trial Was in Violation of Petitioner's Rights under the Sixth Amendment of the United States Constitution to Be Confronted with the Witnesses Against Him.

As reflected in detail on pages 5 to 8, inclusive, of the Statement and on pages 13 to 16, inclusive, as the first point under "Reasons for Granting the Writ" in the original Petition for a Writ of Certiorari filed herein, Exhibits 63 through 68 introduced at the trial of this matter, which went to every count of the indictment, were charts prepared on a non-expert basis by a Special Agent of the Federal Bureau of Investigation. These contained purely hearsay information, as obtained by this Agent from reading investigative reports submitted by other agents and from listening to witnesses at the trial. These exhibits or summaries, which were undoubtedly given much weight by the jury, reflected selective items from conflicting evidence introduced at the trial, *information not appearing in the record* and not obtainable from the record of the trial and, in short, gave the jury hearsay evidence and resolved many questions of fact for the jury.

It thus appears that hearsay evidence was introduced at the trial by the above charts, over objections, which put before the jury evidence from witnesses petitioner was not allowed to confront or cross-examine in violation of his rights under the Sixth Amendment to the Constitution of the United States. This amendment, in part, states that in all criminal prosecutions, the accused shall enjoy the right * * * "to be confronted with the witnesses against him".

Brown v. *United States*, (C.C.A. 6th) 234 F.2d 140, affirmed 78 S. Ct. 622, 356 U.S. 148, 2 L. Ed. 589, rehearing denied 78 S. Ct. 776, 356 U.S. 948, 2 L. Ed. 2d 822, is authority for the fact that the provision of the Sixth Amendment of the Federal Constitution pertaining to the right of an accused to be confronted by witnesses against him imports the constitutional privilege to cross-examine the opposing witness. This is, of course, elementary law, and no effort is being made to list the many other cases available on the same point.

When the government was allowed to introduce evidence at the trial in the nature of charts showing data not otherwise in the record, petitioner certainly had no opportunity to confront or cross-examine the witnesses from whom such data were obtained, or to even learn the identity of such witnesses, and it is respectfully submitted his rights under the said Sixth Amendment were violated.

II.

Petitioner's Convictions Were in Violation of His Rights under the Sixth Amendment of the United States Constitution to Be Informed of the Nature and Cause of the Accusation Where There Were Specific Variances in Identification Numbers of the Automobiles Described in Counts II, IV and VII of the Indictment and Proof Introduced at the Trial.

As reflected in detail on pages 9 and 10 of the Statement in the Petition for a Writ of Certiorari filed herein, there were discrepancies between identifying numbers and the evidence as to three of the seven counts. No effort was made to identify instant automobiles at the trial other than by numbers and these were different under the evidence at the trial than alleged in Counts II, IV and VII of the indictment.

The Sixth Amendment to the United States Constitution states that in all criminal prosecutions, the accused shall * * * "be informed of the nature and cause of the accusation".

Federal indictments cannot be amended without violation of the rights of an accused under the Fifth Amendment of the United States Constitution, as most recently pointed out in *United States* v. *Stepp*, 144 F. Supp. 826, and it is respectfully submitted that where three out of seven counts in an indictment involving numerous similar automobiles are incorrect, petitioner was seriously prejudiced.

III.

Petitioner's Convictions under Counts II, V, VI and VII Were in Violation of His Rights under the Sixth Amendment of the United States Constitution Since There Was No Evidence of Venue Introduced at the Trial or in the Record Showing That Petitioner Committed the Alleged Crimes in the Western District of Missouri.

As pointed out in detail on pages 10, 11 and 12 of the Petition for a Writ of Certiorari filed herein, there was no evidence introduced at the trial of this matter to connect him with the offenses alleged in Counts II, V, VI and VII of the indictment and there was absolutely *no* evidence of any sort introduced at the trial to connect him in any manner whatsoever with the crime alleged in Count II. The government in its brief did not even attempt to refute the statement at page 10 of the petition for a Writ of Certiorari herein that absolutely no evidence was in the record connecting petitioner with Count II. In view of this situation, it is readily apparent that if no evidence was introduced relative to petitioner under said Count II and the other counts above, there was simply no evidence of

venue introduced at the trial to show that petitioner committed the alleged crimes in the Western District of Missouri.

The Sixth Amendment to the United States Constitution, in part, states that in all criminal prosecutions, the accused "shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law * * *."

Petitioner's constitutional rights as aforesaid under the Sixth Amendment were apparently violated with respect to his convictions under counts II, V, VI and VII of the indictment. Venue is an essential which must be proved by the Government, as held by *Dean* v. *United States*, 246 F.2d 335 (C.C.A. 8th) and *United States* v. *Jones*, 174 F.2d 746.

IV.

Petitioner's Rights under the Due Process Clause of the Fifth Amendment of the United States Constitution Were Violated Inasmuch As He Has Been Convicted in a District Court of the United States under Count II of the Indictment in This Matter, This Conviction Has Been Affirmed by the Eighth Circuit Court of Appeals and Certiorari Has Been Denied by This Court Although There Was Absolutely No Evidence Whatsoever Introduced and None Appears in the Record Connecting Petitioner with This Crime and the Government Does Not and Cannot Deny This Fact.

As petitioner has pointed out to the Court of Appeals and as he pointed out to this court on page 10 of the Petition for a Writ of Certiorari filed herein, there is absolutely no evidence in the record connecting petitioner with the crime alleged in Count II of the indictment. It is elementary law that each count of an indictment alleges a

separate and distinct crime. The Government in its Brief in Opposition filed in this matter did not and could not deny the truth of the above statement that there was no evidence in the record connecting petitioner with Count II, although the jury found him guilty of the crime alleged therein, this conviction has been sustained by the Court of Appeals and certiorari has been denied by this court.

The Fifth Amendment to the Constitution of the United States of America states, in part, that no person shall be deprived of "life, liberty, or property, without due process of law * * *."

It is noted that due process of law in a criminal case includes the presumption of innocence and places the burden on the prosecution to prove the guilt of the accused beyond a reasonable doubt by the evidence which it offers and the inferences which may reasonably be drawn therefrom. *Government of the Virgin Islands* v. *Torres*, 161 F. Supp. 699; *Coffin* v. *United States*, 156 U.S. 432, 15 S. Ct. 394, 39 L. Ed. 481; *Agnew* v. *United States*, 165 U.S. 36, 17 S. Ct. 235, 41 L. Ed. 624; *United States* v. *Fleischman*, 339 U.S. 349, 70 S. Ct. 739, 94 L. Ed. 906.

It is respectfully submitted that when petitioner was convicted of a crime in a Federal court without any evidence being introduced to connect him with this crime, this was in violation of his constitutional rights under the Fifth Amendment.

For all the reasons set forth above, Petitioner respectfully asks that he be granted a rehearing on the order denying his Petition for a Writ of Certiorari.

Respectfully submitted,

WALTER A. RAYMOND and
KENNETH C. WEST,
Counsel for Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that the above Petition for Rehearing on Order Denying Petition for Writ of Certiorari in the above entitled cause is presented in good faith and not for delay and that same is restricted to the grounds specified in Rule 58 (2) of this Court.

Kenneth C. West,
Counsel for Petitioner.